Filed 11/27/12 P. v. Voage CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. KEVIN SHAWN VOAGE, Defendant and Appellant.	C069059 (Super. Ct. No. CRF111588)

A jury convicted defendant Kevin Shawn Voage of receiving stolen property. The trial court found true the allegations that he had prior strike convictions and had served five prior prison terms. The trial court sentenced defendant to 25 years to life in prison, plus five years for the enhancements.

Defendant contends (1) the prosecution should not have been allowed to impeach defendant with six prior felony convictions; (2) the trial court abused its discretion in denying defendant's motion for mistrial based on the prosecution's failure to disclose

new evidence; (3) the prosecutor committed misconduct during closing argument; (4) the trial court abused its discretion in refusing to dismiss the prior strike allegations; and (5) on these facts, the life sentence for receiving stolen property constitutes cruel and unusual punishment.

We conclude (1) the trial court did not abuse its discretion in admitting evidence of defendant's prior convictions for impeachment; (2) defendant has not established that the prosecutor's failure to disclose new evidence resulted in prejudice, because the trial court brought the failure to the jury's attention, allowed defendant to recall witnesses and argue the issue to the jury, and instructed the jury with a modified version of CALCRIM No. 306 [untimely disclosure of evidence]; (3) the prosecutor made a fair comment on the evidence and the record does not support defendant's claim of prosecutorial misconduct; (4) the trial court exercised, and did not abuse, its discretion in denying defendant's motion to dismiss the prior strike allegations; and (5) given defendant's current felony conviction, his three prior strikes, and his 29-year recidivist history of criminal conduct, his life sentence is not cruel and/or unusual.

We will affirm the judgment.

BACKGROUND

Kabriella Brandt lived in a two-bedroom house at 2241 West Capitol Avenue in Yolo County. Three cottages were located behind Brandt's house. In March 2011, defendant lived alone in one of the cottages (unit one), about 20 feet from Brandt's house.

For two to three weeks in March 2011, while Brandt was in the hospital and then at a skilled nursing facility, Brandt's long-time friend Bruce Stuart took care of Brandt's four-year-old granddaughter Anna and lived in Brandt's house. During that time, Stuart's job required him to leave town. Before he left, Stuart told defendant that Stuart would be out of town for 10 to 12 days. Stuart locked the doors, closed the windows to Brandt's house, and left town with Anna.

When Stuart returned, he noticed four or five individuals, including defendant, standing outside unit one. The door to the laundry room of Brandt's house was unlocked and had fresh pry marks. The interior of Brandt's house was ransacked.

After walking through Brandt's house, Stuart went to unit one to speak with defendant. The people who Stuart saw with defendant had left. Stuart told defendant that Brandt's house had been burglarized and asked if defendant saw anything. Defendant said he did not. Stuart called the police.

West Sacramento Community Service Officer Ryan Fong was dispatched to Brandt's house. Officer Fong testified that Stuart told him several individuals were standing in the driveway when Stuart arrived at the property, the individuals fled in different directions, and Stuart saw someone enter unit one but no one answered when Stuart knocked on the door to unit one.

While waiting outside Brandt's house for Officer Fong to complete his work, Stuart saw defendant come out of unit one with a clear plastic bag and leave the bag on top of a garbage can next to unit one. Defendant then walked across West Capitol Avenue. Stuart recognized the shower curtain from Brandt's house in the plastic bag defendant left on the garbage can. At trial, Stuart and Brandt identified other items contained in the plastic bag as items taken from Brandt's house. Stuart reported what he saw to Officer Fong. Officer Fong requested assistance from police officers.

West Sacramento Police Officer Brian Schmidt responded to Officer Fong's call for assistance. According to Officer Schmidt, Stuart said he saw defendant place a clear plastic bag containing property taken from Brandt's house on a garbage can, and defendant told Stuart, "if this is your stuff, I have more of it." Stuart then pointed Officer Schmidt to where defendant had gone across West Capitol Avenue.

Officer Schmidt located defendant on West Capitol Avenue across from Brandt's house. Officer Schmidt asked defendant "what's going on?" Defendant responded that he saw several individuals pulling property out of Brandt's house, putting the property on

the driveway, and taking property across West Capitol Avenue to a trailer park. Defendant could not tell Officer Schmidt when he saw the unknown individuals take property out of Brandt's house. But defendant told Officer Schmidt he had Brandt's entertainment center in his garage. Defendant then voluntarily returned to unit one with Officer Schmidt, unlocked his garage, and showed Officer Schmidt the entertainment center. Stuart identified the entertainment center as Brandt's.

Defendant also let Officer Schmidt into unit one. Inside the unit, Stuart identified various items belonging to Brandt, including a stereo, two desk chairs, a desk lamp, a DVD player, and two bags containing prescription medication bottles bearing Brandt's name.

Defendant was placed under arrest. After advising defendant of his *Miranda*[1] rights, Officer Schmidt asked defendant to identify the contents of the clear plastic bag that defendant had placed on the garbage can outside unit one. Defendant admitted that the clear plastic bag contained a shower curtain and food items belonging to Brandt. Defendant said he told Stuart, "if any of that stuff is yours, I have more of it."

Police found many additional items in unit one that had been taken from Brandt's house. A clock from Brant's house was plugged in at unit one. Law enforcement officials also located, in a garbage can by unit one, various items identified as taken from Brandt's house, including a photograph of Anna and a computer keyboard.

Officer Fong collected six latent fingerprints from Brandt's house. Defendant was excluded as a person who left the fingerprints.

Defendant testified at trial. He said he saw, through the window of unit one, several people taking things from the driveway of Brandt's house to a location across the street. Defendant told the people to leave. There was almost an entire houseful of things

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1 *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

on the driveway. Defendant did not return the items to Brandt's house because no one had been home for three weeks and he did not believe the property would be safe at Brandt's house. Instead he used two empty garbage cans to move the items into unit one and may have left some of the things in the garbage cans. He left a computer keyboard in the garbage can because there was a big crack in it. (A crime scene investigator subsequently testified that the computer keyboard found in defendant's garbage can was undamaged.) Defendant testified that he plugged in the stereo and clock taken from Brandt's house to see if they worked because they were wet or damaged. He attached his speakers to Brandt's stereo to see if his speakers worked.

Defendant testified that he thought the items belonged to Anna's mother, Laura Glover, and he intended to return them to her. He saw Stuart at the property later that day. Defendant set a bag of things on a garbage can and told Stuart, "if this bag -- the stuff in this bag is yours, I have the rest of it in my house." Defendant tried to return the items to Stuart, but Stuart became very angry and agitated toward defendant. Because Stuart was becoming more and more upset when defendant tried to talk to him, defendant told Stuart to call the police and defendant walked across the street. Defendant did not call the police because he had a number of prior felony convictions and did not trust the police. But when Officer Schmidt spoke with him, defendant told Officer Schmidt what he saw and what happened. Defendant told Officer Schmidt he had property from Brandt's house and tried to return the property to Stuart, but Stuart became angry with defendant.

A jury convicted defendant of receiving stolen property. (Pen. Code, § 496, subd. (a).)[2] In a bifurcated proceeding, the trial court found true the allegations that defendant had been convicted of two or more serious and/or violent felonies and had served five

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[2] Undesignated statutory references are to the Penal Code.

prior prison terms. The trial court denied defendant's motion to dismiss the prior strike allegations and sentenced defendant to 25 years to life in prison under the three strikes law (§§ 667, 1170.12), plus a determinate term of five years in prison for the section 667.5, subdivision (b) enhancements.

DISCUSSION

I

Prior to trial, defendant made a motion in limine to exclude reference to his prior convictions if he chose to testify. Defendant had 10 prior felony convictions. The trial court granted defendant's motion in part, ruling that if defendant chose to testify, the prosecution could impeach him with six prior felony convictions involving moral turpitude: a February 1, 2006 conviction for criminal threats (§ 422), a February 1, 2006 conviction for sexual battery (§ 243.4, subd. (a)), a May 8, 2000 conviction for using a minor in the sale of marijuana (Health & Saf. Code, § 11361, subd. (a)), a December 1994 conviction for nonviolent escape from jail (§ 4532, subd. (b)), a November 15, 1993 conviction for automobile theft (Veh. Code, § 10851, subd. (a)), and a November 15, 1993 conviction for evading a peace officer (Veh. Code, § 2800.2). In so ruling, the trial court considered defendant's proposal to exclude felony convictions that occurred before 2001. It also considered whether defendant led a crime-free life after 2001 and whether the priors were so cumulative that the jury would decide the case based solely on defendant's criminal history.

Defendant contends that even if his 2006 convictions for criminal threats and sexual battery were properly admitted,[3] the trial court nonetheless abused its discretion in permitting impeachment evidence of his prior convictions for using a minor in the sale of

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[3] At trial, defendant conceded that the crimes of criminal threats and sexual battery involve moral turpitude. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 424 [criminal threats]; *People v. Chavez* (2000) 84 Cal.App.4th 25, 30 [sexual battery].)

marijuana, automobile theft, evading a peace officer, and nonviolent escape from jail. We disagree.

Article I, section 28, subdivision (f) of the California Constitution authorizes the use for impeachment of any prior felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty, subject to the trial court's discretion under Evidence Code section 352. (*People v. Castro* (1985) 38 Cal.3d 301, 306.) A witness's prior felony conviction is admissible for impeachment if the least adjudicated elements of that felony offense necessarily involve moral turpitude. (*Id.* at pp. 316-317.) "Moral turpitude" has been defined as a " 'readiness to do evil,' " "moral depravity" and "moral laxity." (*Id.* at pp. 314-316.) The rationale for felony impeachment is that a felony conviction which may be supposed to show a general readiness to do evil supports an inference of a readiness to lie. (*Id.* at pp. 314-315.)

In determining whether to admit a prior felony conviction for impeachment, a trial court should consider the four factors described in *People v. Beagle* (1972) 6 Cal.3d 441, 453 (*Beagle*). (*People v. Green* (1995) 34 Cal.App.4th 165, 182.) The *Beagle* factors include (1) whether the prior conviction reflects adversely on the witness's honesty or veracity; (2) the nearness or remoteness in time of the prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the witness does not testify out of fear of being prejudiced because of impeachment by prior convictions. (*Ibid.)*

A trial court's exercise of discretion to admit a prior conviction for impeachment will not be disturbed unless it exceeds the bounds of reason, all of the circumstances being considered. (*People v. Green, supra,* 34 Cal.App.4th at pp. 182-183.)

A

Defendant contends the trial court erred in admitting his May 8, 2000 conviction for using a minor in the sale of marijuana (Health & Saf. Code, § 11361, subd. (a)). He contends this is so because the crime of possession of a controlled substance does not

necessarily evince moral turpitude.[4] But defendant was convicted of using a minor in the sale of marijuana, not mere possession. Defendant does not point to anything in the record to contradict this fact.

Defendant also asserts that a violation of Health and Safety Code section 11361, subdivision (a) does not necessarily involve moral turpitude merely because it involves a child. This contention is forfeited because defendant did not raise it below. (*People v. Marks* (2003) 31 Cal.4th 197, 228 [specific grounds for objecting to admission of prior convictions for impeachment were forfeited because they were not raised at trial]; *People v. Maxey* (1985) 172 Cal.App.3d 661, 667-669.) In any event, regardless of the involvement of a minor, a violation of Health and Safety Code section 11361, subdivision (a) involves moral turpitude because it shows an intent to corrupt others. (*People v. Harris* (2005) 37 Cal.4th 310, 337 [possession of narcotics for sale and opening or maintaining a place for the purpose of unlawfully selling, giving away or using specified controlled substances or narcotic drugs evince moral turpitude because these crimes show an intent to corrupt others]; *People v. Castro*, *supra*, 38 Cal.3d at pp. 317-318 [possession of heroin for sale]; *People v. Standard* (1986) 181 Cal.App.3d 431, 435 [possession of marijuana for sale].)

Defendant further argues that evidence of his conviction for violating Health and Safety Code section 11361, subdivision (a) is unduly prejudicial because it involves a minor and invites speculation about his character. But the *Beagle* factors establish that the trial court did not abuse its discretion in admitting evidence of this conviction. A

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[4] Of relevance here, the elements for a violation of Health and Safety Code section 11361, subdivision (a) include: (1) defendant hired, employed or used (2) a person under 18 years of age (3) to unlawfully transport, carry, sell, give away, prepare for sale or peddle marijuana, (4) at the time defendant was 18 years of age or older, and (5) defendant knew of the nature or character of the substance involved as a controlled substance. (Health & Saf. Code, § 11361, subd. (a); CALCRIM No. 2392.)

violation of Health and Safety Code section 11361, subdivision (a) is prima facie admissible because, as we explained, it involves moral turpitude. (*People v. Castro, supra,* 38 Cal.3d at pp. 316-317.) Any moral turpitude "has some 'tendency in reason' [citation] to shake one's confidence in [the witness's] honesty." (*Id.* at p. 315.) While the prior conviction for using a minor in the sale of marijuana occurred 11 years before the trial for the current offense, the prior conviction was not for the same or substantially similar conduct as the instant offense for receipt of stolen property (§ 496, subd. (a)). Moreover, evidence concerning the prior conviction did not take up undue time at trial, and the facts underlying the prior felony conviction were not presented to the jury. In addition, the trial court's ruling to admit the prior did not deter defendant from testifying at trial. These factors indicate that the trial court did not abuse its discretion in admitting the prior conviction for using a minor in the sale of marijuana.

B

Defendant admits there is authority that his December 1994 conviction for nonviolent escape from jail (§ 4532, subd. (b)) was a crime involving moral turpitude. Defendant is correct. (*People v. Lang* (1989) 49 Cal.3d 991, 1009-1010 [escape without force is a crime necessarily involving moral turpitude]; *People v. Waldecker* (1987) 195 Cal.App.3d 1152, 1157-1158.)

Nonetheless, defendant contends the trial court abused its discretion in admitting the prior conviction for impeachment because "[t]he motivation for escape is not necessarily related to a lack of credibility." Again, however, defendant did not preserve this contention for appeal because it was not raised below. (*People v. Marks, supra,* 31 Cal.4th at p. 228; *People v. Maxey, supra,* 172 Cal.App.3d at pp. 667-669.)

In his reply brief, defendant attempts to distinguish *People v. Lang, supra,* 49 Cal.3d 991 by speculating that his conviction for nonviolent escape may not have involved a risk of injury. He states, "[f]or all we know, the defendant may have surrendered himself before he was even known to be missing." But in determining

whether a felony necessarily involves moral turpitude, a trial court looks to the least adjudicated elements of the offense and does not go behind the fact of the conviction and receive evidence on the underlying facts to determine whether the offense evinces moral turpitude. (*People v. Castro*, *supra*, 38 Cal.3d at pp. 316-317.) Based on its elements, the crime of nonviolent escape is a crime of moral turpitude. (*People v. Lang*, *supra*, 49 Cal.3d at pp. 1009-1010.)

C

Regarding his November 15, 1993 conviction for automobile theft (Veh. Code, § 10851, subd. (a)), defendant claims the prior conviction should have been excluded under Evidence Code section 352 because it involved conduct similar to the conduct charged in the present case and thus had a greater prejudicial effect. Defendant forfeited this claim because he did not raise the argument below and does not cite authority supporting the contention that section 496, subdivision (a) and Vehicle Code section 10851, subdivision (a) involve similar conduct. (*People v. Marks*, *supra*, 31 Cal.4th at p. 228; *People v. Maxey*, *supra*, 172 Cal.App.3d at pp. 667-669; *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1045, fn. 1; *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656 ["It is the appellant's responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf"].)

Defendant's contention lacks merit in any event. He was convicted of automobile theft in 1993 but he was not charged with nor convicted of theft in the present case. The current felony conviction is for receipt of stolen property. Moreover, the similarity between the impeaching offense and the current offense is just one factor for the trial court to consider in exercising its discretion, and the admission of a conviction for a similar offense is not necessarily an abuse of discretion. (*See, e.g., People v. Green*, *supra*, 34 Cal.App.4th at pp. 173, 183.)

D

Defendant next urges that his November 15, 1993 conviction for evading a peace officer (Veh. Code, § 2800.2) was improperly admitted because it was not clear from the record that the officer's safety was actually endangered. This argument is also forfeited for failure to raise it below. (*People v. Marks, supra,* 31 Cal.4th at p. 228; *People v. Maxey, supra,* 172 Cal.App.3d at pp. 667-669.) And it also fails on the merits because the offense of evading a peace officer is a crime involving moral turpitude. (*People v. Dewey* (1996) 42 Cal.App.4th 216, 218, 221-223.) In deciding whether defendant's 1993 conviction was admissible for impeachment the trial court was not required to determine whether the peace officer's safety was actually endangered in the particular case leading to defendant's 1993 conviction. (*People v. Castro, supra,* 38 Cal.3d at pp. 316-317.)

E

Defendant further asserts that his 2000, 1994 and 1993 convictions should have been excluded because they are remote. But in determining whether a prior conviction should be excluded based on remoteness, a trial court may consider defendant's conduct subsequent to the prior conviction and his age at the time of the prior offense. (*People v. Green, supra,* 34 Cal.App.4th at p. 183 [prior conviction that occurred 20 years before the trial of the current offense was admissible for impeachment because defendant did not lead a blameless life after the prior conviction]; *People v. Campbell* (1994) 23 Cal.App.4th 1488, 1496-1497 [10-year-old prior conviction was admissible where defendant had not led a legally blameless life in the interim]; *People v. Burns* (1987) 189 Cal.App.3d 734, 738.)

Here, defendant persisted in committing crimes after his felony conviction in 2000. His repeated unlawful conduct, following prior convictions and incarceration, was relevant to his " 'readiness to do evil' " and, hence, his credibility. (*People v. Castro, supra,* 38 Cal.3d at pp. 314-316; *People v. Green, supra,* 34 Cal.App.4th at p. 183.)

In addition, defendant was in his 30s when he was convicted of the prior offenses and there is no basis for concluding that he was a minor when he committed those offenses.

On this record, the trial court did not abuse its discretion in admitting defendant's prior felony convictions for impeachment.

II

Defendant argues the trial court abused its discretion in denying defendant's motion for mistrial based on the prosecution's failure to disclose new evidence.

A

On the first day of trial, the prosecutor met with Stuart before Stuart testified. During the meeting, Stuart said that in March 2011 he gave defendant notice that Stuart was leaving town. He also told the prosecutor that he spoke to defendant before Officer Fong arrived at Brandt's house and defendant denied knowing anything about the burglary. In addition, Stuart denied the reference in Officer Schmidt's report that defendant told Stuart, "if any of this stuff is yours, I have more of it." The prosecutor did not disclose to defendant the new statements made by Stuart at the meeting, even though they were inconsistent with, or not included in, the police reports.

The prosecutor called Stuart as a witness the next day (the second day of trial). Stuart testified that when he left town, he told defendant he would be out of town for 10 to 12 days. Stuart further testified that when he returned to Brandt's house and saw it had been burglarized, he spoke to defendant, asked if defendant had seen anything, and defendant responded "no." Stuart testified that defendant did not tell him there was more of Brandt's property in unit one.

Continuing his testimony, Stuart reviewed Officer Fong's report and said the report did not contain all of the statements he made to Officer Fong on March 30, 2011. In particular, according to Stuart, Officer Fong's report failed to state that Stuart spoke with defendant before Officer Fong's arrival.

Stuart also denied the statement in Officer Schmidt's report that defendant told Stuart, "if any of this stuff is yours, I have more of it."

During cross-examination of Stuart, defense counsel elicited that Stuart had mentioned these new facts to the prosecutor the previous day.

Defendant moved for a mistrial as a sanction for the prosecution's failure to disclose Stuart's statements that (1) Stuart gave defendant notice that Stuart was leaving town, (2) Stuart spoke to defendant before Officer Fong arrived at Brandt's house and defendant denied knowing anything about the burglary, and (3) Stuart did not tell Officer Schmidt that defendant said, "if any of this stuff is yours, you can have it." The prosecutor admitted she learned this new information from Stuart on the first day of trial. The prosecutor said she did not disclose the information to defense counsel because the information was not exculpatory.

The trial court ruled that the prosecutor should have disclosed Stuart's statements to defendant, but it denied defendant's motion for mistrial. Instead, the trial court said it would instruct the jury with a modified version of CALCRIM No. 306 [untimely disclosure of evidence] and would permit defendant to recall Stuart or Officer Fong for further questioning if he wished.

Defendant recalled Officer Fong, who testified that Stuart did not say he spoke with defendant before Officer Fong arrived at Brandt's house.

At the close of the evidence, the trial court instructed the jury as follows: "Both the People and the defense must disclose their evidence to the other side before trial within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose to defense that she had a conversation with witness Bruce Stuart just prior to her opening statement where he told her certain things which could be considered to be inconsistent with or not included in the

reports of police department witnesses. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

During closing argument, the prosecutor acknowledged that she erred in not disclosing Stuart's statements to the defense. She argued, however, that the error did not change the fact that defendant received stolen property. Defense counsel also directed the jury's attention to the prosecutor's failure to disclose, and told the jury it must decide whether Stuart was truthful in his testimony. Defense counsel pointed out that Stuart's testimony contradicted the testimony of Officer Fong and Officer Schmidt in certain respects.

B

The prosecution must disclose substantial material evidence favorable to defendant, even if defendant did not request such evidence. (*People v. Wright* (1985) 39 Cal.3d 576, 590.) This duty of disclosure extends not only to evidence that bears directly on the question of defendant's guilt, but also to evidence relating to the credibility of prosecution witnesses. (*Ibid.*)

If the prosecution violates the duty of disclosure, a trial court has broad discretion to determine the appropriate sanction. (§ 1054.5; *People v. Wright, supra*, 39 Cal.3d at p. 591.) Not every failure to disclose evidence requires dismissal of the charges. (*People v. Wright, supra*, at p. 591.) " 'The remedies to be applied need be only those required to assure the defendant a fair trial.' [Citation.]" (*Ibid.*) Defendant bears the burden of showing that the prosecution's failure to timely provide discovery was prejudicial and that the remedial measures taken by the trial court were inadequate to prevent prejudice. (*People v. McKinnon* (2011) 52 Cal.4th 610, 668; *People v. Verdugo* (2010) 50 Cal.4th 263, 281-282; *People v. Wright, supra*, 39 Cal.3d at p. 591.)

In *People v. Wright, supra*, 39 Cal.3d 576, after counsel completed closing arguments and the jury was instructed, but before the commencement of deliberations, defense counsel discovered that the prosecution failed to disclose several police reports of

interviews with the victim's wife on the night of her husband's death. (*Id.* at p. 590.) The defendant claimed the reports tended to impeach the trial testimony of the victim's wife. (*Ibid.*) It was determined that the reporting officer inadvertently failed to forward the late-discovered reports to the district attorney and the materials were, thus, not made available to the defendant. (*Ibid.*) The trial court denied the defendant's motion for mistrial as a sanction for the prosecution's failure to disclose. (*Ibid.*) Instead, the trial court informed the jury of the late-discovered reports, permitted the defendant to reopen his case to present additional evidence, and allowed both sides to present additional argument to the jury with regard to the new evidence. (*Id.* at pp. 590-591.) The California Supreme Court rejected the defendant's appellate contention that the procedure adopted by the trial court failed to cure the prejudice caused by the prosecution's breach of its disclosure duty. (*Id.* at p. 591.) The Supreme Court held that the remedial procedure used by the trial court ensured that no prejudice to the defendant resulted. (*Ibid.*)

Here, like in *People v. Wright, supra,* 39 Cal.3d 576, the trial court informed the jury of the late-discovered evidence, permitted defendant to recall witnesses, and allowed both sides to argue the issue to the jury. The jury received evidence that contradicted Stuart's trial testimony and evidence that defendant tried to return Brandt's property. At the close of evidence, the trial court instructed the jury on how to view the new evidence. Under these circumstances, we cannot conclude that the prosecution's failure to disclose Stuart's statements to defendant resulted in prejudice.

Defendant nonetheless asserts, in a cursory fashion, that he would have altered his defense strategy if the prosecution had disclosed Stuart's statements earlier. He claims the delay in disclosure limited his ability to develop the theme that Stuart hated him. But such bare assertions are insufficient to meet defendant's burden on appeal. (*People v. Verdugo, supra,* 50 Cal.4th at pp. 281-282 [generalized statements such as " '[t]imely disclosure of the information would have enabled counsel to adjust his theory of the case

to fit the facts' " are insufficient to establish prejudice, and no prejudice existed when defendant could not explain what counsel would have done differently, had discovery been disclosed sooner].)

Contrary to defendant's claim that he was unable to develop his theme of Stuart's animosity and lack of credibility, defendant testified that Stuart generally did not talk to defendant, Stuart was very hostile when defendant tried to return Brandt's belongings, and Stuart was a liar. There was also evidence that Stuart was very angry with defendant on March 30. Further, defense counsel told the jury it should disregard Stuart's testimony, calling it "the testimony of an angry man" and stating that Stuart was exaggerating, biased or had a motive to "do his utmost" to help convict defendant. Defense counsel pointed out that the testimony of Officer Fong and Officer Schmidt contradicted Stuart's testimony about his conversations with defendant, and that Stuart's claim that Officer Fong and Officer Schmidt's reports were wrong was incredible.

Defendant says the judgment should be reversed here just as it was in *People v. Navarette* (2010) 181 Cal.App.4th 828 (*Navarette*). But *Navarette* is distinguishable. In that case, a police officer testifying at trial referenced the defendant's prior statement to police. (*Id.* at p. 831.) The defendant moved for mistrial because the trial court had expressly barred use of the statement at trial. (*Id.* at p. 831.) The trial court denied the defendant's motion for mistrial but struck the officer's testimony, precluded the officer from testifying further and instructed the jury to disregard the officer's testimony. (*Id.* at pp. 831-833.) The appellate court held that while a curative instruction to disregard improper testimony is ordinarily sufficient to protect a defendant from prejudice, the instructions given in that case could not undo the damage created by the officer's deliberate violation of the trial court's order. (*Id.* at pp. 834-837.) That was because given the weakness in the prosecution's case, the jury could infer from the officer's reference to the defendant's statement to police that the prosecution did not present

stronger evidence of guilt because the defendant had confessed or otherwise incriminated himself. (*Ibid.*)

No such irreparably damaging evidence is at issue here. Rather, the jury could reasonably have disregarded the challenged aspects of Stuart's trial testimony because they were contradicted by the testimony of two law enforcement officers and defendant. As we have explained, the procedure used by the trial court was adequate to ensure that the prosecutor's failure to disclose did not prejudice defendant.

III

During her closing argument, the prosecutor argued that defendant's asserted intent to return the property taken from Brandt's house was unbelievable in part because defendant did not inform the police of that intent. The prosecutor argued, "[t]he defense wants you to believe that the defendant's testimony was consistent with what he told the officers. Perhaps consistent with one very important exception. The defendant never told the officers anything about Laura Glover, never, not until -- we never heard about Laura Glover until three months later in this courtroom . . . ." Defense counsel objected to the prosecutor's statement on the grounds of "[m]isstatement of the facts." The trial court responded that the jury was best equipped to determine what the facts were based on the evidence they heard. The prosecutor then continued, "The defendant did not tell the officers about Laura Glover. You heard from Officer Schmidt. Had he been told that there was an intent to return the property to Laura Glover and that [defendant] was looking for Laura Glover's phone number, he would have written it down in his report and he did not."

Defendant contends this argument -- that his intent to return the property to Glover was unbelievable because he never mentioned it to the police -- amounted to prosecutorial misconduct because the police officers did not give him an opportunity to tell his side of the story. Defendant also claims the trial court erred by overruling his objection to the prosecutor's statement to the jury.

A prosecutor may make fair comment on the evidence, which can include reasonable inferences. (*People v. Gamache* (2010) 48 Cal.4th 347, 370-371.) Although a prosecutor's reference to facts not in the record constitutes misconduct (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213), here the prosecutor's argument was a fair comment on the evidence. Contrary to defendant's contention, the record supports an inference that defendant had an opportunity to tell police officers his version of events.

Officer Schmidt asked defendant what happened and, according to defendant, he told Officer Schmidt what occurred and what he saw. Defendant said he told Officer Schmidt he tried to return Brandt's property to Stuart. Defendant subsequently testified that police officers did not ask him his side of the story when he was taken to the police station, but defendant also admitted that he told police what he did. Because the record supports the inference that defendant had an opportunity to tell law enforcement officers what happened, defendant's claim of prosecutorial misconduct and judicial error is not established. (*People v. Brady* (2010) 50 Cal.4th 547, 585-586 [no misconduct where prosecutor's argument was an accurate comment on the evidence presented].) Defendant assigns no other basis for error to the prosecutor's remarks.

IV

Defendant contends the trial court abused its discretion in refusing to dismiss the prior strike allegations.

The three strikes law was intended to restrict a trial court's discretion when sentencing a defendant previously convicted of a serious and/or violent felony. (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) "To achieve this end, 'the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell

outside the Three Strikes scheme." ' [Citation.]" (*Ibid.*) There is a strong presumption that any sentence that conforms to the sentencing norm is both rational and proper and the circumstances must be " 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' . . . ." (*Id.* at p. 378.)

A trial court may, " 'in furtherance of justice' " pursuant to section 1385, subdivision (a), dismiss an allegation or finding under the three strikes law that a defendant has previously been convicted of a serious and/or violent felony. (*Carmony, supra,* 33 Cal.4th at p. 373; *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*); *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 504 (*Romero*).) However, dismissal of a strike is a departure from the three strikes sentencing norm and a trial court must follow stringent standards to depart from the norm. (*Carmony, supra*, 33 Cal.4th at p. 377.) In ruling on a motion to dismiss an allegation or finding that a defendant has previously been convicted of a serious and/or violent felony, a trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at p. 161.)

A trial court's decision not to dismiss a prior strike allegation is subject to review under the deferential abuse of discretion standard. (*Carmony, supra,* 33 Cal.4th at p. 374.) Where the trial court, aware of its discretion, " 'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the [three strikes] law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Id.* at p. 378.) The party attacking the sentence must clearly show that the sentencing decision was irrational or arbitrary. (*Id.* at 376.) " ' "In the absence

of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.]" (*Id.* at pp. 376-377.)

In this case, defendant made a motion under section 1385 to dismiss allegations of his prior strikes: convictions for attempted murder, robbery and criminal threats. In ruling on defendant's motion, the trial court considered, among other things, the probation report which discussed defendant's relationships and his history of employment, drug use, crime, education and vocational training. The trial court also considered the factors set forth in *Williams, supra,* 17 Cal.4th at page 161. The trial court denied defendant's motion, concluding that defendant did not fall outside the spirit of the three strikes law. In particular, the trial court found that defendant was a career criminal with "significant and disturbing" prior strikes; he violated the trust of his neighbor; the current offense demonstrated an inability to live in civilized society without continued criminality; and although he might have prospects for the future because of his participation in programs to address his addiction, defendant still presented a danger to society.

On this record, the trial court exercised its discretion under section 1385 and the record supports the trial court's decision.

Defendant fails to show that the trial court's ruling was an abuse of its discretion, taking into consideration the factors described in *Williams, supra,* 17 Cal.4th 148. With regard to the current felony, defendant had in his possession a substantial amount of property that he knew had been taken from the house of his neighbors Brandt and Glover, who he was aware had been absent from their home for weeks. He showed little regard for his neighbor's property, discarding some of Brandt's belongings, including a photograph of Brandt's granddaughter, and using Brandt's stereo. Although he claimed he did not intend to keep any of the property taken from Brandt's house, the jury did not find defendant's claim credible.

Defendant contends the current offense was nonviolent and relatively minor, but "any felony triggers a longer sentence under the Three Strikes law as long as the defendant has sustained at least one strike. . . . [T]he nonviolent or nonthreatening nature of the [current] felony cannot alone take the crime outside the spirit of the [Three Strikes] law." (*People v. Strong* (2001) 87 Cal.App.4th 328, 344, fn. omitted.) Moreover, defendant's 29-year criminal record contains crimes involving use of force or violence, beginning with his 1982 conviction for attempted murder and ending with his 2010 conviction for battery. We disagree with defendant's suggestion that his crimes since 1982 are not serious in nature.

Regarding his prior convictions, as his trial counsel conceded, defendant has a "long and storied career in regards to the criminal justice system." Defendant's current felony conviction follows a long history of criminal conduct dating back to when he was 20 years old. The record does not show that defendant's criminal activity was abating with age.

At age 20, defendant received three felony convictions for attempted murder, robbery and false imprisonment. He was sentenced to 17 years four months in prison. In 1993, defendant received two more felony convictions for automobile theft and evading a peace officer, which were apparently committed while he was on parole. He was sentenced to five years probation in 1993. But less than two months later, in 1994, his probation was revoked when he received his sixth felony conviction for nonviolent escape from jail. From 1996 to 1999, defendant violated the terms of his parole four times. In 2000, he received his seventh felony conviction for using a minor in the sale of marijuana. He was sentenced to prison for three years and violated parole in 2001. In 2002, he received his eighth felony conviction for unlawful possession of methamphetamine; he was sentenced to two years eight months in prison. In 2004 and 2005 he again violated parole. In 2006, he received his ninth and tenth felony convictions for criminal threats and sexual battery. He was sentenced to three years in

prison in 2006 and violated parole four times from 2007 through 2009. In 2010, he received two misdemeanor convictions for battery of a person in a dating relationship and unauthorized entry into an occupied dwelling house; he was sentenced to one year in jail. The current offense occurred on March 30, 2011, less than six months after defendant was discharged from parole, and defendant received his eleventh felony conviction for receiving stolen property. Defendant's convictions for attempted murder, robbery and criminal threats are serious and/or violent felonies under the three strikes law. (§§ 667.5, subd. (c)(12), (c)(9), 1192.7, subd. (c)(9), (c)(19), (c)(38).)

As for his prospects for committing future crimes, defendant has not been continuously employed. He claims on appeal that the conduct leading to his current confinement is entirely drug related. But defendant committed the current offense despite his participation in Alcoholics Anonymous and/or Narcotics Anonymous. He is a long-term marijuana and methamphetamine user and has been unable to refrain from criminal activity. Under these circumstances, the trial court did not abuse its discretion in concluding that defendant's drug addiction was not a factor supporting dismissal of a prior strike allegation. Defendant's record shows that he is a "revolving-door career criminal" for whom the three strikes law was devised. (*People v. Strong*, *supra*, 87 Cal.App.4th at p. 340 [making same observation concerning a defendant with 22-year criminal record which included 12 misdemeanors and six felonies]; *People v. Gaston* (1999) 74 Cal.App.4th 310, 312, 320 [three strikes initiative (§ 1170.12) is aimed at revolving-door career criminals].)

Having found true the allegation that defendant had prior serious and/or violent felony convictions, the trial court was required to sentence defendant under the three strikes law. (*Carmony, supra,* 33 Cal.4th at p. 377.) Defendant has not shown that the sentence imposed is not consistent with the law. (§§ 667, 667.5, 1170.12.)

Citing *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), defendant contends the trial court should have dismissed one of his 1982 strikes (attempted murder or robbery)

because they arose from a single incident. In *Benson*, the California Supreme Court stated, but did not decide, that there "are some circumstances in which two prior felony convictions are so closely connected -- for example, when multiple convictions arise out of a *single act* by the defendant as distinguished from multiple acts committed in an indivisible course of conduct -- that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id.* at p. 36, fn. 8, emphasis added.) In *People v. Scott* (2009) 179 Cal.App.4th 920, 923, 931, this court held that the "closeness" between two prior felony convictions is one factor for a trial court to consider in exercising its discretion to dismiss a strike.

Here, however, there was no evidence upon which the trial court could find that the 1982 convictions arose from a single act or were so closely connected as to justify dismissing one of the prior conviction allegations. It was not the trial court's obligation to gather information supporting defendant's motion. (*People v. Scott, supra,* 179 Cal.App.4th at p. 925, fn. 2 [defendant bears the burden of showing that a strike should be stricken, thus, to the extent defendant wanted to show that his two strikes arose from the same act, he must produce evidence of that fact]; *People v. Lee* (2008) 161 Cal.App.4th 124, 128-131 ["unless the defendant presents evidence in support of his request, he forfeits his right to complain that the court's denial of *Romero* relief did not take into account that evidence"].) Further, even if the trial court had dismissed one of the 1982 prior conviction allegations, defendant would still have two qualifying prior felony convictions and would have been sentenced to an indeterminate term of life in prison. (§§ 667, subd. (e)(2); 1170.12, subd. (c)(2).)

In his reply brief, defendant appears to argue that the trial court should have dismissed his 1982 prior conviction allegations because the convictions are 30 years old. We do not address this contention because it was raised for the first time in the reply brief. (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.) No good cause has been shown for defendant's failure to present this claim earlier.

V

Defendant next contends that the sentence he received violates the state and federal constitutional prohibitions against cruel and/or unusual punishment. We disagree.

" 'Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment. [Citations.]' " (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358.)

A

We turn first to defendant's state constitutional claim. Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel or unusual punishment." A sentence may violate this prohibition " 'if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Uecker* (2009) 172 Cal.App.4th 583, 600.) "Our Supreme Court has emphasized 'the considerable burden a defendant must overcome in challenging a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment. While these intrinsically legislative functions are circumscribed by the constitutional limits of article I, section 17 [of the California Constitution], the validity of enactments will not be questioned "unless their unconstitutionality clearly, positively, and unmistakably appears." ' [Citation.]" (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.)

We consider three areas when assessing a penalty for disproportionality: (1) the nature of the offense and the offender, with particular regard to the degree of danger present to society; (2) a comparison of the sentence with punishments for different offenses in the same jurisdiction; and (3) a comparison of the sentence with punishments

for the same offense in other jurisdictions. (*People v. Uecker, supra,* 172 Cal.App.4th at p. 600 [citing *In re Lynch* (1972) 8 Cal.3d 410, 425-427 (*Lynch*)].)

Regarding the first area, the nature of the offense and the offender, " 'we must consider not only the offense as defined by the Legislature but also "the facts of the crime in question" (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts); we must also consider the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind.' [Citation.]" (*People v. Uecker, supra,* at p. 600.)

Defendant says the crime of receiving stolen property posed no physical danger to society. This argument ignores the fact that the three strikes law addresses a defendant's recidivism, not just the current offense. " 'Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent sentences.' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 570.) Here, defendant's long criminal history includes convictions for crimes of violence and theft, prior prison sentences which failed to deter him from returning to crime, and numerous parole violations over the years. Defendant is the kind of recidivist offender who poses a danger to society and for whom the three strikes law imposes lengthier prison sentences.

Defendant further argues that his crimes have been of decreasing seriousness. But receiving stolen property is not an inconsequential crime. Brandt suffered real harm. Moreover, defendant's argument of decreasing seriousness again ignores the increasing seriousness of his recidivism.

In addition, defendant contends his criminal conduct is linked to his drug dependency. But defendant's drug history does not establish disproportionality in this case. Defendant is a career recidivist who poses a danger to the public.

Accordingly, defendant's long criminal history validates the punishment imposed under the three strikes law.

As for the second area described in *Lynch* -- a comparison of the sentence with punishments for different offenses in the same jurisdiction -- defendant argues that the penalties under the three strikes law are so severe they are completely out of proportion to any comparable penalty in California. (*Lynch*, *supra*, 8 Cal.3d at p. 426.) He points out that the penalty imposed in this case is the same as the penalty for first degree murder, while the penalty for second degree murder is significantly less than what he received.[5]

We reject defendant's argument because the three strikes law addresses his recidivism in combination with his current offense. (*People v. Uecker, supra,* 172 Cal.App.4th at p. 601.) The penalties cited by defendant do not provide proper comparison. (*Ibid.*; *People v. Sullivan*, *supra,* 151 Cal.App.4th at p. 571.) " 'Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare [defendant's] punishment for his "offense," which includes his recidivist behavior, to the punishment of others who have committed more serious crimes, but have not qualified as repeat felons.' [Citation.]" (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1338.)

Turning to the third area identified in *Lynch* -- a comparison of the sentence with punishments for the same offense in other jurisdictions -- defendant states that California's three strikes law exceeds the sentences imposed under the recidivist statutes of other states. (*Lynch, supra*, 8 Cal.3d at p. 427.) But he does not specify the states he claims provide lesser penalties for comparable circumstances. We need not address

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[5] Of course, the punishment for first degree murder may be greater than the 25-year-to-life sentence imposed on defendant, because a person convicted of first degree murder may be subject to the death penalty or life in prison without the possibility of parole. (§ 190, subd. (a).)

defendant's claim because it is not supported by citation to supporting authority and analysis. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283.)

Defendant points out that even the victim, Ms. Brandt, "disparaged" defendant's sentence in this case. But because he cites no authority showing that the victim's opinion concerning proportionality is a relevant factor in our analysis, the claim is forfeited. (*Okasaki v. City of Elk Grove, supra,* 203 Cal.App.4th at p. 1045, fn. 1; *Keyes v. Bowen, supra,* 189 Cal.App.4th at p. 656.)

Defendant fails to show that, applying the three *Lynch* factors to the circumstances of this case, his sentence was so disproportionate to the offense being punished that it shocks the conscience and offends notions of human dignity. (*People v. Mantanez, supra,* 98 Cal.App.4th at pp. 359-367 [sentence of 25 years to life in prison under the three strikes law for possession of heroin and receiving stolen property does not constitute cruel or unusual punishment under federal and California Constitutions]; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1424-1433 [sentence of 25 years to life in prison under three strikes law for theft of $3 magazine was not cruel or unusual under federal and California Constitutions]; *People v. Cline, supra,* 60 Cal.App.4th at p. 1338 [sentence of 25 years to life in prison imposed under three strikes law for shoplifting $648 worth of merchandise was not cruel or unusual punishment under California Constitution]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1086-1087, 1093-1094 [sentence of 25 years to life in prison under three strikes law for shoplifting a pair of pants and then attempting to get a refund for the same does not amount to unconstitutionally cruel or unusual punishment].)

B

Defendant also contends that his sentence violates the Eighth Amendment of the United States Constitution.

The Eighth Amendment, which forbids cruel and unusual punishments, contains a proportionality principle that applies to noncapital sentences. (*Ewing v. California*

(2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 116-117] (plur. opn. of O'Connor, J.) [Eighth Amendment contains a narrow proportionality principle]; cf. *id.* at pp. 32-33 [at pp. 125-126] (dis. opn. of Stevens, J.) [Eighth Amendment requires proportionality in sentencing]; *id*. at pp. 35-36, 52 [at pp. 126-127, 137-138] (dis. opn. of Breyer, J.) [Eighth Amendment contains "gross disproportionality" principle which applies to a sentence of a term of years].) But the Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [115 L.Ed.2d 836, 869] (conc. opn. of Kennedy, J.).) Strict proportionality between the crime and the sentence is not required. (*Ibid.*)

Proportionality analysis under the Eighth Amendment begins by comparing the gravity of the current offense with the harshness of the penalty. (*Ewing v. California, supra,* 538 U.S. at p. 28 [155 L.Ed.2d at p. 122]; *Rummel v. Estelle* (1980) 445 U.S. 263, 276 [63 L.Ed.2d 382, 392].) But we do not view defendant's current offense in isolation; rather, we consider it in the context of his history of felony recidivism. (*Ewing v. California, supra,* 538 U.S. at p. 29 [155 L.Ed.2d at p. 122].) This is because we must defer to the legislative judgment that offenders who have committed serious or violent felonies and who continue to commit felonies should be given harsher sentences. (*Ibid.*)

"Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." (*Rummel v. Estelle, supra,* 445 U.S. at p. 272 [63 L.Ed.2d at p. 390].) The United States Supreme Court has upheld life sentences imposed for nonviolent felonies under recidivist statutes. (*Ewing v. California, supra,* 538 U.S. at pp. 30-31 [155 L.Ed.2d at p. 123] [25–year–to–life sentence under three strikes law for theft of three golf clubs worth $399 each]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 77 [155 L.Ed.2d 144, 159] [two consecutive prison terms of 25 years to life for two separate thefts of less than $150 worth of videotapes]; *Rummel v. Estelle, supra,* 445 U.S. at pp. 266, 285 [63 L.Ed.2d 386, 397-398] [life sentence imposed against third-time felon for obtaining $120.75 by false pretense, a felony].)

As we have explained, defendant's sentence is amply supported by the nature of his current offense and his recidivism. The conduct leading to the current felony conviction cannot be characterized as passive, harmless, or a mere technical violation of the law. (Cf. *Solem v. Helm* (1983) 463 U.S. 277, 296 [77 L.Ed.2d 637, 653] (*Solem*); *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1077.) In light of the facts supporting the current felony conviction and defendant's recidivism, the sentence imposed is not so extreme as to give rise to an inference of gross disproportionality. (*Ewing v. California, supra*, 538 U.S. at pp. 30-31 [155 L.Ed.2d at p. 123]; *Rummel v. Estelle*, *supra*, 445 U.S. at pp. 266, 285 [63 L.Ed.2d at pp. 386, 397-398].)

Defendant discusses *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755 (*Ramirez*) in his opening brief but does not apply *Ramirez* to the facts here. *Ramirez* is inapposite. The defendant in *Ramirez* was convicted of shoplifting a $199 video cassette recorder and sentenced under the three strikes law based on two prior shoplifting offenses. (*Ramirez*, *supra*, 365 F.3d at p. 756.) He had no other prior convictions. (*Id.* at p. 768.) The criminal record of the defendant in *Ramirez* is far different from defendant's lengthy history of felonies and parole violations.

Defendant also contends that, given his age and the fact that he will not be eligible for parole until 2036, his sentence is similar to the life-without-possibility-of-parole sentence condemned in *Solem v. Helm*, *supra*, 463 U.S. 277 [77 L.Ed.2d 637]. We disagree. Unlike the defendant in *Solem v. Helm*, defendant is eligible for parole. (*Solem*, *supra*, 463 U.S. at p. 297 [77 L.Ed.2d at p. 654].) Even if, without consideration of credits, parole would not be available to defendant until he is 78, his sentence is not unconstitutional. The United States Supreme Court has upheld sentences imposed under recidivist statutes even when parole was unavailable, or was unavailable until the defendant was 87 years old. (*Lockyer v. Andrade*, *supra*, 538 U.S. at pp. 66, 77 [155 L.Ed.2d at pp. 151-152, 159]; *Harmelin v. Michigan*, *supra*, 501 U.S. at pp. 961, 996

[115 L.Ed.2d at pp. 843, 865]; cf. *Ewing v. California, supra*, 538 U.S. at pp. 30-31 [155 L.Ed.2d at p. 123].)

Defendant's sentence of 25 years to life in prison is not unconstitutionally cruel and unusual given his current felony conviction, his three prior strikes, and his 29-year history of criminal conduct.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

RAYE, P. J.

BUTZ, J.